

**Mohan Vs. State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** Jul-22-2002

**Reported in :** 2003CriLJ1891; RLW2003(4)Raj2432

**Judge :** A.C. Goyal, J.

**Acts :** Indian Penal Code (IPC) - Sections 363, 366 and 376

**Appeal No. :** S.B. Criminal Appeal No. 390 of 1999

**Appellant :** Mohan

**Respondent :** State of Rajasthan

**Advocate for Def. :** Madhav Mitra, P.P.

**Advocate for Pet/Ap. :** S.S. Sunda and; M.L. Kumawat, Advs.

**Disposition :** Appeal allowed

**Judgement :**

**Goyal, J.**

1. This appeal is directed against the judgment dated 22.5.1999 in Sessions Case No. 52/1998, whereby the learned Additional Sessions Judge, Deeg District Bharatpur held the accused appellant Mohan guilty for offence under Sections 363, 366 & 376 1PC and sentenced him to one year rigorous imprisonment and a

fine of Rs. 1000/-, in default 15 days rigorous imprisonment, five years rigorous imprisonment and a sum of Rs. 5000/- as fine, in default one month rigorous imprisonment and 10 years rigorous imprisonment and a fine of Rs. 5000/-, in default one year rigorous imprisonment under Sections 363, 366 & 376 IPC respectively. All the sentences were directed to run concurrently.

2. The case of the prosecution in brief is that PW-4 Lalchand lodged a written report Ex.P.3 at Police Station Kotwali, Deeg, at 10.15 a.m. on 11.2.1998 with the averments that his niece Urmila aged. 16/18 years was kidnapped today by some unknown person and the informant has got suspicion upon Mohan. Formal F.I.R. No. 65/1998 Ex.P.4 under Sections 363 & 366 was registered. After usual investigation, the charge-sheet was submitted. In due course, this case came up for trial before learned Additional Sessions Judge, Deeg. The accused appellant was charged under Sections 363, 366, 376 IPC. He pleaded not guilty and claimed trial. The prosecution examined 25 witnesses. Thereafter, the accused was examined as provided by Section 313F Cr.P.C. He denied the prosecution evidence but did not lead any evidence in defence. Learned Judge having heard learned counsel for the parties convicted and sentenced the accused as stated hereinabove.

3. I have heard the learned counsel for the appellant, learned Public Prosecutor and perused the judgment and record of the case.

4. The first contention raised by learned counsel for the appellant is that at the time of the incident the victim was not below the age of 18 years and thus the offence under Section 363 IPC is not made out. Learned Public Prosecutor supported the findings of the Trial Judge on the point of the age of the victim. Section 359 IPC defines kidnapping. Kidnapping is of two kinds, kidnapping from lawful guardianship that whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship. Section 363 provides punishment for kidnapping. Second offence against appellant is that of abduction punishable

under Section 366 IPC. Section 362 IPC defines abduction that whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person. According to Section 366 IPC, it is necessary to prove that the accused kidnapped or abducted any woman with intent that she may be compelled to marry any person against her will or she may be forced or seduced to illicit inter-course. The third offence is of rape punishable under Section 376 IPC.

5. To appreciate the arguments advanced by learned counsel for the parties, firstly, the age of the victim on the day of occurrence has to be determined. The learned Trial Judge arrived this conclusion that victim was below 18 years of age but she was not below the age of 16 years. The age of the victim is stated to be 16/18 years in the First Information Report itself which is EX.P.3 and it was lodged at 10.15 a.m. on 11.2.1998 and the incident took place at 2 a.m. i.e. in the previous night. When confronted Ex.P.3 on the point of the age of the victim, PW4 Lalchand showed his ignorance as to how the age of the victim is stated to be 16/18 years in Ex.P.3, thus the informant failed to explain as to why he stated the age of the victim 16/18 years in Ex.P.3. Lalchand further stated in cross-examination that he does not know that the age of the victim was 18 years at the time of her marriage with one Sh. Dori Lal. He also pleaded his ignorance regarding the age of Dori Lal. According to Lalchand the age of the victim should be 14 to 15 years. Thus, Lalchand did not give any positive evidence about the age of the victim though he is the uncle of the victim. The next relevant witness on this point is PW-12 Pooran, father of the victim. No question was put to him in examination-in-chief regarding the age of the victim. In cross-examination, he stated that his daughter qualified 4th class or 5th class and she was a student in Jai Bharat School. He stated that the age of his daughter is 16 years. Third important witness on this point is PW-9 victim herself. She stated in cross-examination that she qualified 6th Class and she is about 16 or 16 and a half years. Her statement was recorded on 1.10.1998 and this occurrence is dated 11.2.1998. According to the statement of the victim herself she was about 16 years of age at the time of occurrence. Now medical evidence on this point has to be considered, PW-16 Dr. S.P. Sharma medically examined the victim on 12.2.1998 with the help of lady Dr. Santosh Gupta, PW- 23. According to the

statement of Dr. Sharma and his report Ex.P. 14. 14, her age was assessed between 14 to 15 years on the basis of x-ray of radius and ulna, 17 to 18 years on the basis of the fusion of bones of right elbow and between 15 to 16 years on account of non-fusion of illiacrest. Thus, her average age was found between 15 and half year to 16 and half year. In cross- examination, he opined that there may be a difference of two years in age either side. Learned counsel for the appellant contended that she qualified 6th class and she was a student in a school but no admission form, entry in the admission register of school regarding her age and other relevant documentary evidence was not produced and thus adverse inference should have been drawn against prosecution holding her age not below 18 years. Learned Public Prosecutor contended that there is no ground to interfere with the findings of the Trial Court on this point. I have considered the rival submissions. According to the oral testimony of PW-9 victim and PW-12 Pooran, father of the victim, no definite conclusion can be drawn that the victim was below 18 years at the time of occurrence. In other words, prosecution failed to prove by oral testimony the age of the victim to be below 18 years at the relevant time. The prosecution did not offer any explanation as to why the relevant record pertaining to her age was not produced in the court. As stated hereinabove the victim and her father both stated that she was a student in the school and according to the statement of the victim she qualified 6th class, Therefore, it was the duty of the prosecution to produce the admission form, the entries in the admission register maintained in the school and other relevant documentary evidence on this point. Since prosecution did not produce the best available evidence, presumption should have been drawn against the prosecution. It is true that medical evidence in respect of age cannot be exact and the determination of the age is by the reference of lower and higher margins as stated hereinabove. According to the medical report Ex.P. 14 given by PW-16 Dr. S.P. Sharma, the age of the victim may be 18 years and the benefit of outer margin regarding the age of the victim should be given to the accused. Thus, in view of such medical evidence, the age of the victim may be taken to be 18 years or more. However, the prosecution failed to prove that she was under 18 years of age at the relevant time. Therefore, the offence under Section 363 IPC is not even constituted.

6. The next important question arises as to whether the appellant abducted the victim with intend that she may be compelled to marry against her will or she will be forced or seduced to illicit intercourse? for proving the offence of rape, it has to be seen as to whether the appellant committed sexual intercourse with her by putting her in fear of death or of hurt or against her will. She stated that at about 5.00 a.m. on 11.2.98, she went in jungle to be ease. The accused Mohan came there and took her to a bus by force and then they went to village Kama. The accused left her in the house of her cousin sister. Thereafter, at about 10.00 a.m., Police came and took her to Deeg Police Station. In cross-examination, she stated she was sleeping in her house in the night alongwith her parents, sisters and brothers. She further stated that doors of the room in which she was sleeping and the house wee open. It was also stated by her that at 5.00 a.m. accused Mohan took her from her house. In the next breath, she stated that the accused Mohan caught hold of her on the way near the Cinema Hall and no person was present at that time nearby. It was also stated by her that the accused tied her mouth with cloth and accused put something on her mouth, so she became unconscious in the bus. When confronted with pr Police statement Ex.D-4, she admitted that this fact is missing from her police statement that the accused put something on her mouth and she became unconscious. This fact was also not stated by her in her statement Ex.P.21 recorded under Section 164 Cr.P.C. On careful consideration of the entire statement of the victim, it is unsafe to rely upon her, as she gave not only contradictory statements before the trial court but her statement before the trial Court is also contrary to her police statement as well as statement recorded under Section 164 Cr.P.C. At one place she stated that she was forcibly taken by the accused, when she was going to jungle at about 5.00 a.m., at the second place she stated that the accused took her at 5.00 a.m. from her house and again at the third place she stated that she was caught hold of by the accused near Cinema Hall. There is no corroboration of the statement of the victim, although a number of witnesses were examined by the prosecution. PW-1 Shiv Charan stated that at about 5.00 a.m. he was going to his field, When he reached near a temple he found the accused with the victim and the accused was forcing the girl to board the bus and thereafter both of them boarded the bus. he further stated that the girl was weeping but he left for his field. He further stated that father and the brother of

the girl came to him after half an hour and he disclosed all these facts to them. In cross-examination, he stated that at about 7.30 a.m. he narrated these facts to father and brother of the girl. On a careful consideration of the statement, it is clear that he is not reliable witness. Had he seen such incident, he would not have gone to the field. According to him, he did not make any effort to intervene and this shows unnatural conduct on the part of PW-1 Shiv Charan. According to him he narrated this incident at about 7.30 a.m. to the father and the brother of the girl but PW-12 father of the girl stated that he came to his house from his field at about 7.00-8.00 a.m. and his brother Lalchand informed him that the girl is missing and thereafter Dinesh and Vijay told him that the accused took his daughter. Thus the statement of Shiv Charan is not corroborated even by the father of the girl. Further, according to the informant Lalchand, he found that her niece was not in the house in the night and then he lodged report. According to the statement of PW-4 Lalchand and the First Information Report, the accused took the victim with him at about 2.00 a.m. in the night. As stated hereinabove, according to the statement of the victim she was taken at about 5.00 a.m. PW-2 Vijay Kumar stated that at about 5.00 a.m. he came to have tea at Durga tea stall. He saw the accused with the victim. His statement is also not reliable because in the month of February i.e. 11.2.1998 this witness would go to have a tea on some tea stall at about 5.00 a.m. in the winter appears quite unnatural. On the one hand, he stated that he saw that the accused was forcibly taking the girl and on other hand he stated that when he came back to his house, he heard that someone has abducted the girl. Therefore, this witness is also wholly unreliable. PW-3 Dinesh stated that at about 5.00 he was going to 'Chungi Naka' and saw the accused taking the girl by force. According to him, he saw this incident near temple and Cinema Hall but the victim stated that none was present near the temple or Cinema Hall or Chungi Naka at that time. Therefore, the statement of this witness is also wholly unreliable. PW-5 Virendra Singh also stated that at that time he went to Yadav Restaurant for a cup of tea and then he witnesses that accused was forcing the girl and the girl was crying and after 5 to 10 minutes both of them boarded a bus. On the similar grounds as stated hereinabove, this witness is also not reliable at all. On the similar is also not reliable at all. On the similar grounds the statement of PW-6 Hukam Singh is also wholly unreliable. Therefore, the

prosecution failed to prove that the accused appellant took away the victim by force or by any deceitful means. The prosecution also failed to prove intention or knowledge of the accused appellant as provided by Section 366 IPC. According to the statement of the victim herself, she was taken to village Kama. She along with the accused appellant reached there at about 10.00 a.m. and the accused left her in the house of his cousin sister and went away and five minutes thereafter police reached there. It shows that the accused appellant had no intention either to marry her against her will or to induce her for illicit inter-course. According to the statement of Investigating Officer and site plan, the girl was found sitting upon Chabu-tari outside the house of the cousin sister of the accused. It shows that the victim was sitting in the open place at about 10.00a.m. in village Kama. Ex.P.9 is another site plan of the place from where the girl is said to be abducted. According to this site plan, the houses of informant Lalchand and Ram Singh were situated nearby. Had the girl been taken by force, she would have raised hue and cry to attract the residents of these houses. It is also very pertinent to say that she was taken by a bus from Deeg to Kama and she did not raise any hue and cry either in the bus or at the bus-stand of Kama and on the way where she was taken. The victim herself did not depose that she made any complaint to any person on the way. All these facts go to show clearly that she accompanied the appellant at her own and thus, no offence under Section 366 IPC is proved.

7. The third charge is that the accused appellant committed rape on her at about one month prior to this incident of abduction. Thus, according to the charge, the appellant committed rape on 10th or 11th January, 1998. The prosecutrix stated in examination-in-chief that whenever she used to go to the field, accused appellant used to follow her. She further stated that two days prior to her abduction, the appellant caught hold of her and had sex with her when she was in jungle. She next stated that at that time her brother Nannu came there and he quarreled with the accused but no report was lodged. In cross-examination she stated that the accused had sex with her one month prior to 11.2.1998. Thus, in examination-in-chief she stated that the accused had sex with her two days prior to this incident and in cross-examination she stated that he accused had sex with her one month prior to this incident. In view of such complete contradictory statement regarding the time of such incident, her statement cannot be relied upon beyond doubt.

There is absolutely no explanation as to why if such an offence like rape was committed, why this matter was not reported to the police for more than a month. According to the statement of the victim, her brother Nannu came there and a quarrel took place between her brother and the accused. Even then no report was lodged and her brother Nannu was not examined during the trial. When the victim was confronted with her another police statement Ex.D.5, she denied that the accused committed rape on her for two times. This is also a very important contradiction from the police statement and it also creates serious doubts regarding the reliability of the statement of the victim. There is no corroboration of the statement of the victim also even by medical evidence. According to the statement of Dr. S.P. Sharma and Dr. Santosh Gupta, there was no injury on the person or private parts of the victim and naturally so because according to the victim herself, rape took place more than one month prior to her medical examination. Both the doctors were unable to give any opinion regarding recent inter-course with the victim and it was also stated that she was habitual to sexual inter-course. Therefore, the prosecution failed to prove beyond doubt that the accused appellant had sex with the victim. Thus, offence under Section 376 IPC is also found not proved.

8. Consequently, this appeal is allowed. The judgment dated 22.5.1999 convicting and sentencing the appellant is set aside. He is acquitted of all the charges. He is in jail since 12.2.1998. He be set at liberty immediately if not required in any other case.

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